Supreme Court, U.S.
FILED
JUN 24 1994
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(2)

No. 93-1886

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1993

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T. I. CONSTRUCTION COMPANY, INC.,
*Petitioner,*

v.

KIEWIT EASTERN COMPANY, *et al.*,
*Respondents.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

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## BRIEF FOR THE RESPONDENTS IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the courts below and the United States Department of Transportation ("USDOT") correctly concluded that, under USDOT's regulations governing its Disadvantaged Business Enterprise ("DBE") program, a prime contractor on a federal project may terminate a DBE subcontractor for convenience pursuant to a clause in a privately negotiated subcontract where (a) the prime contractor at all times exceeded the required 10% DBE utilization goal, (b) there were repeated disagreements between the contractor and subcontractor regarding the subcontractor's project work and compensation, and (c) there was no claim by the subcontractor of a discriminatory termination.

2. Whether the judgment of the courts below was in any event correct because a clause in the parties' privately negotiated contract expressly precluded the recovery of lost profits, which was the only remedy sought by petitioner in the district court.

## STATEMENT UNDER RULE 29.1

Petitioner, appellant below, is T.I. Construction Company ("T.I."). Respondents are advised that T.I. has no parent or subsidiary company.

Respondents, appellees below, are Kiewit Eastern Company, Perini Corporation, and a joint venture of these two companies known as Kiewit/Perini, a Joint Venture (collectively referred to herein as "Kiewit").

Kiewit Eastern Company was merged into Kiewit Construction Company in December 1992. Kiewit Construction Company is a wholly owned subsidiary of Kiewit Construction Group, Inc. and Kiewit Construction Group, Inc. is a wholly owned subsidiary of Peter Kiewit Sons' Inc.

Perini Corporation has no parent company and has one non-wholly owned subsidiary, Perland Environmental Technologies, Inc.

The Kiewit/Perini joint venture has no parent company or non-wholly owned subsidiaries.

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OCTOBER TERM, 1993

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No. 93-1836

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T. I. CONSTRUCTION COMPANY, INC.,
*Petitioner,*

v.

KIEWIT EASTERN COMPANY, *et al.*,
*Respondents.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

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## BRIEF FOR THE RESPONDENTS IN OPPOSITION

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Respondents, by their undersigned counsel, submit this brief in opposition to the petition for a writ of certiorari in this case and request that the petition be denied.

## STATEMENT OF THE CASE

T.I.'s Statement Of The Case is fraught with omissions and misstatements of fact.

For example, T.I. fails to point out that at all times during this project Kiewit exceeded the required 10% DBE utilization goal. While T.I. repeatedly refers to this 10% DBE requirement, it neglects to state that Kiewit continued to comply with the goal even after the termination of T.I.[1]

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[1] The face amount of Kiewit's contract with the Pennsylvania Department of Transportation ("PennDOT") was $102,441,343.75. Subcontracts awarded to DBEs at all times relevant to this case exceeded $11.6 million.

T.I. also omits any reference to the continuing strained relationship between Kiewit and T.I. during the entire course of the project. Kiewit terminated T.I. only after the parties had struggled for over a year and a half with numerous disputes regarding project scheduling, site coordination, backcharges, and compensation. While T.I. concedes that the parties had "differences" which led to a meeting in October 1989 and a release of claims by T.I. (Pet., p. 6.), T.I. fails to acknowledge that the parties' differences and strained relationship continued even after the parties' meeting. (Pet. App. A-6 at n.7; A-13 to A-14 at n.9.) The parties' relationship was particularly strained by T.I.'s repeated, unsupported accusations that Kiewit continually defrauded T.I. during the project.[2] As USDOT summarized this state of affairs in its letter rulings on T.I.'s administrative challenge to its termination:

> . . . repeated disagreements occurred between T.I. and Kiewit/Perini concerning scheduling and site preparation, as well as who would perform what work, how it would be accomplished, and the amount of compensation.
>
> Disputes of this type are not unusual. When they occur, the prime contractor may find they interfere with the orderly conduct of business . . . . Therefore, the contractor may terminate a subcontractor "for convenience." (USDOT Letter of December 27, 1990, included in the Appendix to this Brief at App. 2a.)[3]

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[2] The courts below found T.I.'s accusations of fraud to be wholly unsupported by any evidence (Pet. App. A-11 to A-17), and T.I. does not challenge that determination in this Court. T.I. also fails to point out that it was represented by counsel at the October 1989 meeting when it executed the release of claims and that it received substantial payments and other contractual concessions in exchange for the release. (Pet. App. A-7.)

[3] Many of the relevant facts are set forth in the district court's Opinion, which is reproduced in the Appendix to the Petition. T.I.

Another misstatement is T.I.'s assertion that its performance was "satisfactory." (Pet., p. 7.) In view of the serious difficulties between the parties, this statement clearly does not tell the whole story. As USDOT stated in its letter rulings:

> As noted in Mr. Willett's letter to Mr. Moyer [T.I.'s counsel at that time], the work T.I. Construction performed was satisfactory. In any business relationship, however, satisfactory completion of work is only one component of "successful" performance. In this case, the problem was the lack of cooperation between the two parties—and it became ever more serious. This "friction" resulted in repeated disagreement over project details and compensation. The prime contractor finally concluded that a suitable working relationship was not possible and, therefore, terminated the contract "for convenience," as permitted by the contract terms.
>
> (USDOT Letter of Feb. 14, 1991, App. 9a to 10a.)

T.I. also fails to note that at no time did it claim that its termination was discriminatory. This is significant because both USDOT and the courts below concluded that the DBE regulations allow terminations for convenience unless the termination violated the regulatory directive against discrimination based on race, color, national origin or sex. (Pet. App. A-18 to A-25; App. 1a, 7a to 8a.) As USDOT concluded after its thorough review and field investigation, T.I.'s termination "was handled properly and [there was] no evidence of discrimination against T.I." (App. 4a.) USDOT further noted that this matter "was essentially a contract dispute between a prime contractor and a DBE subcontractor, not a civil rights issue." (App. 8a.)

In view of the admittedly nondiscriminatory nature of T.I.'s termination, its assertion that termination for con-

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failed to include in its Appendix copies of USDOT's rulings in its case, and they are included in the Appendix to this Brief ("App.").

venience clauses should be absolutely barred as a matter of federal law because they can be used as a pretext for discrimination surely rings hollow. If the allegedly important issue is the potential for discriminatory termination (Pet., pp. 10-11), this case is the wrong one in which to raise the point.

T.I. is also guilty of selective and partial quotation of the relevant USDOT regulations and manuals. T.I. cites and relies on the "maximum opportunity" language of 49 C.F.R. § 23.43(2) (Pet., p. 5) as if this were a guarantee that it could not be terminated in accordance with the contract it freely signed. T.I. fails to quote the next sentence of the regulation, however, which contains the directive against discrimination on the basis of race, color, national origin or sex. This additional explanatory language is important in light of the discussion above regarding discriminatory terminations.

T.I. also selectively quotes from 49 C.F.R. § 23.45(f) and wrenches the language of Subsection (2) out of context. (Pet., p. 5.) In context, Section 23.45(f) as a whole deals with the requirement that state recipients, like PennDOT, establish procedures for determining the eligibility of DBEs. Subsection (2) of this eligibility section reads as follows in its entirety:

> Recipients shall require their prime contractors to make good faith efforts to replace an MBE subcontractor that is unable to perform successfully with another MBE. The recipient shall approve all substitutions of subcontractors before bid opening and during contract performance, in order to ensure that the substitute firms are eligible MBEs. 49 C.F.R. § 23.45(f)(2).

The clear purpose of this Subsection is to help ensure that contractors use good faith efforts to keep the total DBE participation level on USDOT-funded contracts at or above the required level during the entire course of the project. This purpose was clearly satisfied in this case.

By its terms, the regulation prevents a contractor from circumventing the DBE goal by obtaining a contract award with legitimate DBE participation and then, after obtaining the award, replacing the DBE with a non-DBE. It requires the state recipients to monitor and approve DBE replacements during a project to confirm their eligibility and to ensure that contractors strive in good faith to meet DBE participation goals. The state recipient here, PennDOT, after an administrative hearing, approved the termination, thereby fulfilling the requirements of the regulations (Pet. App. A-8, n.8; App. 2a, 10a). Moreover, the language of 49 C.F.R. § 23.45(f)(2) does not directly address the reasons why a DBE may be terminated but rather only what the state recipients should do *after* a termination.

In addition, while T.I. relies on language in a USDOT training manual (Pet., pp. 9-10), it fails to refer to the cautionary language that appears both in the Forward and Introduction. That language emphasizes that the manual imposes no requirements not set out in the regulations themselves. (Pet. App. A-39 to A-40.)

Finally, T.I. largely ignores the extensive and multiple administrative and judicial proceedings it initiated over the last four years both on a state and federal level challenging its termination. In each forum, the termination has been consistently upheld as not violative of any federal or state law. The extensive administrative and judicial background is detailed to a large extent in the district court's Opinion. (Pet. App. A-8, n.8.) In a nutshell, T.I. had a hearing on its termination before PennDOT, whose decision approving the termination was appealed to the highest level of the Pennsylvania state courts. T.I. next challenged its termination by seeking administrative review before USDOT, resulting in the two letter rulings previously referred to herein. T.I. then turned against USDOT by challenging its administrative decision. *T.I. Constr. Co. v. Skinner,* Civil Action No. 91-2433 (E.D.

Pa.). USDOT filed a motion to dismiss that action arguing that termination for convenience clauses are a necessary, indeed integral, part of the federal contracting process and are not violative of any DBE policy. (Pet. App. A-20 to A-21.) T.I. ultimately voluntarily dismissed its action against USDOT without prejudice, thereby avoiding a resolution of USDOT's motion.

Having failed before PennDOT, in the state courts and with USDOT, T.I. turned on Kiewit and others. By the time the flurry of court filings was over in September 1991, T.I. had filed five different complaints in three different actions against sixteen different parties, all of which have been either withdrawn, dismissed, or resulted in judgment against T.I.[4] T.I.'s flurry of litigation was finally brought to a halt by the district court's extensive Opinion of December 9, 1992, granting summary judgment to Kiewit on T.I.'s principal claims. (Pet. App. A-3 to A-33.)[5] The court of appeals affirmed without opinion on the basis of the district court's Opinion. (Pet. App. A-1 to A-2.) It is from this decision that T.I. seeks review by this Court.

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[4] *T.I. Constr. Co. v. Kiewit Eastern, et al.*, Civil Action No. 91-3570 (E.D. Pa.); *T.I. Constr. Co. v. Kiewit Eastern, et al.*; Civil Action No. 91-2638; *T.I. Constr. Co. v. Skinner*, Civil Action No. 91-2433 (E.D. Pa.).

[5] As T.I. notes in its Petition (p. 7, n.3), the district court had previously dismissed T.I.'s RICO claims in an extensive opinion. T.I. filed an interlocutory appeal to the Third Circuit after its RICO claim was dismissed. That appeal was dismissed. *T.I. Constr. Co. v. Kiewit Eastern Co., et al.*, No. 92-1740 (3d Cir.).

## ARGUMENT

Despite petitioner's hyperbole and the parade of horrors allegedly created by the decisions of USDOT and the courts below, this case presents no important or controversial issue that warrants the attention of this Court. The decisions are not only consistent with the purposes of the DBE program but also with the overall federal goal of ensuring that projects built with federal funds are built efficiently and expeditiously. If petitioner's position were accepted, the termination for convenience clause, which is routinely included in governmental and private contracts, would be rendered a nullity with respect to DBE contractors (although remain perfectly valid in the case of non-DBEs).[6] Where, as here, there is no claim of discriminatory termination and the required 10% DBE utilization goal was continually maintained, federal interests are fully protected. Hence, there is no reason for the Court to intervene in what is essentially a private dispute between two parties under a privately negotiated subcontract.

Also, there is no issue in this case of any conflict with prior decisions either of this Court or among the circuits. The courts below properly deferred to USDOT's expertise in interpreting its own regulations following the clear directives of prior decisions of this Court. USDOT refused to interpret its regulations to create a new federal

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[6] Termination for convenience clauses are standard in governmental and private contracts. Indeed, they are *required* in government funded contracts. (Pet. App. A-20.) While the clauses had their genesis in government contracting, particularly in wartime, they are now used in private contracting as well. Such a clause allows flexibility on projects by permitting the termination of a contract without formal declaration of default. The clause typically provides for notice, payment for work performed and payment of termination costs to the terminated party. The clause in question in this case so provided. (Pet. App. A-6, n.6.) *See* Justin Sweet, *Sweet on Construction Industry Contracts* § 21.9 (2d ed. 1992); Steven G. M. Stein, *Construction Law* ¶ 4.13[3] (1994).

right nullifying termination for convenience clauses solely because of one's DBE status, at least where the DBE was not claiming a discriminatory termination. Contrary to T.I.'s claim, this decision was not inconsistent with any prior USDOT pronouncements.

Finally, the decisions of the courts below are fully sustainable on an alternative ground, which the courts below found unnecessary to address. The remedy that T.I. sought in this case, recovery of lost profits, was expressly precluded by the parties' contract. Hence, even if the Court were to address the issue raised by T.I., the judgment below would have to be sustained for separate reasons.

## I. THE TERMINATION OF T.I. FOR CONVENIENCE PRESENTS NO NOVEL, IMPORTANT OR CONTROVERSIAL ISSUE THAT SHOULD BE DECIDED BY THIS COURT AND USDOT'S INTERPRETATION OF ITS OWN REGULATIONS WAS ENTIRELY CONSISTENT WITH FEDERAL POLICY

Contrary to T.I.'s claim, the decisions below do not strike "at the heart" of the DBE program or render the 10% utilization goal "illusory." (Pet., pp. 10, 12.) The purpose of the program is to prevent discrimination and to mandate a certain level of DBE participation to compensate for past underrepresentation on USDOT contracts. *See* 45 Fed. Reg. 21,173 (March 31, 1980). On the facts of this case, there is and can be no claim that these purposes are being undermined.

Indeed, the record clearly does not support T.I.'s claim that the DBE program will be "effectively eviscerated" because termination for convenience clauses can be used as a "pretext for discrimination." (Pet., pp. 10-11.) As noted previously, there is not even a *claim* of discrimination in this case. If the possibility of pretext is the "important question" which should be decided (Pet., p. 11), it is simply not presented here.

Likewise without merit is petitioner's claim that termination for convenience clauses should be outlawed because they might result in the use of DBEs who are "fronts" or who are "intimidated" by the contractor. There is no claim here that DBEs on this project were "intimidated." Although T.I. did claim that one project DBE was a "front," it presented absolutely no evidence supporting this claim, and the claim was dismissed by the courts below. (Pet. App. A-15 to A-16.)

Indeed, based on the parties' research, this case appears to be the only case ever decided involving the application of a termination for convenience clause to a DBE subcontractor. If the issue were so critical and could affect all federal construction projects, as T.I. speculates, it is surprising that the issue has never been raised. The explanation can only be that it is not an issue likely to arise with any frequency.

The entire premise of T.I.'s argument is that USDOT's regulations should be interpreted as expressly and unequivocally prohibiting the termination of DBEs for convenience and requiring instead that DBE terminations be based solely on declarations of default. In essence, T.I. is claiming a new federal right based solely on its DBE status precluding it from being terminated in the same way as a non-DBE could be terminated.

Despite T.I.'s claims, there is nothing in the DBE regulations that addresses the termination of a DBE during the term of its contract or establishes the reasons why a DBE may be terminated. In support of its regulatory interpretation, T.I. latches onto the words in Section 23.45(f)(2) referring to good faith efforts to replace a subcontractor "unable to perform successfully." From this oblique and indirect reference, T.I. leaps unjustifiably to the conclusion that termination for convenience clauses should not be enforceable against DBEs. As USDOT

and the courts below have repeatedly ruled, this argument is clearly without merit.

USDOT's final letter to T.I. during the administrative review process concluded as follows:

> The Federal law governing the DBE program for Federal-aid highway projects is Section 106(c) of the Surface Transportation and Uniform Relocation Assistance Act of 1987. Section 106(c) does not address the subject of termination.
>
> The DOT's regulations on the DBE program, contained in 49 CFR 23, do not establish the reasons why a DBE subcontractor may be terminated. Instead, Section 23.45(f)(2), the section Ms. Evans is referring to, only addressed replacement of a DBE *after* termination.
>
> . . . In PennDOT's DBE specifications, Section K(3) provides that the prime contractor can substitute for a DBE firm that "fails to perform successfully" (the same language as in our regulation).
>
> In accordance with normal industry practice, prime contractors and subcontractors enter into contractual arrangements . . . . The clauses contained therein are legally binding on the signing parties, namely, the prime contractor and the subcontractor. *Under Section 6(e) of the contract between Kiewit/Perini and T. I. Construction on the Blue Route project, the prime contractor can terminate the contract "for convenience." Ms. Evans signed the contract with this provision, which does not conflict with our DBE regulations.*

(App. 8a to 9a.) (Emphasis added.)

USDOT's interpretation of the statutory, regulatory and contractual scheme makes sense and is fully consistent with its DBE program. It is not the purpose of the regulations to interfere unduly with the parties' right to negotiate contract terms acceptable to both nor to tie

the hands of contractors who work on federal projects from effectuating their contracts in the most efficient way. Where, as here, there is no civil rights issue and where Kiewit concededly maintained the required level of DBE participation at all times, federal interests are satisfied.

Nor does the general language quoted by T.I. regarding "maximum opportunity" or "assisting MBEs throughout the life of contracts" (Pet., pp. 2, 5), prohibit terminations for convenience. These statements of general purpose merely reiterate the policy of enabling DBEs to participate in USDOT contracts on equal terms with non-DBEs. Prime contractors on projects funded by taxpayers' dollars, especially lump sum contracts with stringent time requirements, should not be foreclosed by federal law from utilizing the terms of their privately negotiated subcontracts when, in their view, the efficiency of their performance requires it.

## II. THE COURTS BELOW PROPERLY FOLLOWED PRIOR DECISIONS OF THIS COURT BY ACCORDING DEFERENCE TO USDOT'S EXPERTISE IN INTERPRETING ITS OWN REGULATIONS

T.I. urges that its Petition should be granted to review the extent to which deference is due to administrative agency decisions. This is entirely unnecessary.

T.I. essentially urges that USDOT's letter rulings, issued by USDOT in the specific context of T.I.'s termination, should be ignored. These letters were issued after a thorough review and investigation of T.I.'s claims, including interviews of T.I.'s president and its counsel, together with a review of substantial documentary evidence and argument submitted by T.I. (App. 1a, 5a.) T.I. argues against deference to USDOT's interpretation because it claims that a memorandum written by a deputy USDOT administrator six years before its termination (Pet., p. 9) and a DBE Program Manual (Pet., pp. 9-10) took an inconsistent position. T.I. is wrong.

First, it would have been irresponsible for the courts below, in light of the admitted silence of the regulations on terminations for convenience, not to defer to USDOT's interpretation of the regulations that it administers. Indeed, to depart from USDOT's interpretation, as T.I. suggests, would be contrary to decisions of this Court. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) (where the "statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."); *see also Disabled in Action of Pa. v. Sykes*, 833 F.2d 1113, 1117 (3d Cir. 1987), *cert. denied*, 485 U.S. 989 (1988); *Beatty v. Schweiker*, 678 F.2d 359 (3d Cir. 1982).

Under this Court's decisions, the appropriate standard is whether the agency's determination is permissible and not "arbitrary, capricious or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844. As the Court has stated, "[a]n agency's expertise is superior to that of a court when a dispute centers on whether a particular regulation is 'reasonably necessary to effectuate . . . the purposes' of the Act the agency is charged with enforcing; the agency's position, in such circumstances, is therefore due substantial deference." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 845 (1986).[7]

Second, the courts below analyzed fully T.I.'s position and correctly found that its reliance on a 1984 memorandum and a program Manual is misplaced because neither was inconsistent with USDOT's position that federal law did not prohibit T.I.'s termination for conveni-

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[7] In *Martin v. OSHRC*, 499 U.S. 144, 151 (1991), the Court stated:

> Because applying an agency's regulation to complex or changing circumstances calls upon the agency's unique expertise and policy making prerogatives, we presume that the power authoritatively to interpret its own regulations is a component of the agency's delegated law making powers.

ence. The 1984 memorandum merely states that in order to alter a DBE list *after* contract award, the prime contractor must demonstrate to the recipient of federal funds "that the listed minority subcontractor is unable to perform because of default or *overextension on other jobs or provide other similar justification for the State's approval. There must be a solid basis for the change.*" (Pet., p. 9, emphasis added.) Rather than being inconsistent with USDOT's position, this memorandum is actually supportive in that it makes specifically clear that reasons *other than default* are permissible. The memorandum only indicates that the state must be satisfied with the reason for the change, and here both PennDOT and USDOT were satisfied that a "solid basis" existed for Kiewit's action. Moreover, as noted by the district court, the memorandum "does not state that a material breach [of contract] is required or that a termination for convenience clause is invalid." (Pet. App. A-24.)

As to the program Manual, the courts below properly discounted its significance in accordance with decisions of this Court holding that agency manuals do not create legal rights, have no legal force, and do not bind the agency. *Schweiker v. Hansen*, 450 U.S. 785, 789 (1981). Indeed, as the district court noted, the Manual contained cautionary language emphasizing that it imposed no new or additional requirements not already required by federal law or regulation. (Pet. App. A-22 to A-23.) In any event, the Manual is not inconsistent with USDOT's interpretation. It states that a contractor may "substitute" a DBE if it demonstrates to the state that the DBE is "unwilling or unable to perform." Like the 1984 memorandum, it does not specifically address terminations for convenience nor does it state that a default is required. As to the language "unwilling or unable to perform," as USDOT pointed out specifically addressing T.I.'s case, there is more to a subcontractor's successful performance

than satisfactory completion of the technical work. (App. 9a-10a.)[8]

### III. THE JUDGMENT BELOW IS FULLY SUSTAINABLE ON THE ALTERNATIVE GROUND THAT THE DAMAGES SOUGHT BY T.I. WERE PRECLUDED BY A DAMAGE LIMITATION CLAUSE IN THE PARTIES' CONTRACT

In the courts below, Kiewit raised the alternative point that, even assuming the termination clause were unenforceable, the parties' subcontract nevertheless expressly limited T.I.'s remedies and precluded recovery of lost profits. (Pet. App. A-5 to A-6. ) In light of the courts' conclusion that the termination clause was enforceable, they did not reach this issue. Their decisions are nevertheless fully sustainable on this alternative ground.

Limits on damage awards are fully enforceable in federal contracts as well as under Pennsylvania law, which applies here. *See, e.g., Rhen v. United States*, 17 Cl. Ct. 140 (1989); *N.Y. State Elec. & Gas v. Westinghouse Elec. Corp.*, 387 Pa. Super. 537, 548, 564 A.2d 919, 924 (1989). In *Rhen*, the court stated that "assuming arguendo that plaintiff's contract was improperly terminated, he would not, as a matter of law, be entitled to recover anticipated profits. This is so because under the contract's Termination for Convenience Clause, anticipated, but unearned, profits are not recoverable." 17 Cl. Ct. at 143.

Hence, for this additional reason, this is simply not a case that this Court should hear.

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[8] Because there is no inconsistency between USDOT's ruling in T.I.'s case and its prior pronouncements, the cases cited by T.I. in its Petition, p. 13, are inapplicable to this case.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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June 24, 1994

# APPENDIX

## APPENDIX

[SEAL]

U.S. Department
of Transportation

Federal Highway
Administration

400 Seventh St., S.W.
Washington, D.C. 20590

December 27, 1990
Refer to: HPD-1

Mr. William D. Moyer, Jr.
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P.O. Box 434
Narberth, Pennsylvania 19072

Dear Mr. Moyer:

This is in further reply to your June 26 letter to Secretary of Transportation Samuel K. Skinner on behalf of T. I. Construction Company, Inc. (T.I.). You asked for a *de novo* review and investigation of the decision by the prime contractor on the Blue Route construction project, Kiewit/Perini, to terminate T.I.'s subcontract.

Mr. William T. Hudson, Director of the U.S. Department of Transportation's Office of Civil Rights (DOT/OCR), acknowledged your letter on July 13 and forwarded it to the Federal Highway Administration (FHWA) for reply. Because of the seriousness of your allegations and those of Ms. A. Dixie Evans, an FHWA review team conducted an in-depth field review, including interviews with Ms. Evans and officials of the Pennsylvania Department of Transportation (PennDOT).

After we completed our evaluation, the DOT/OCR officials reviewed our findings and concluded that it did not have jurisdiction over this matter under Title 49, Code of Federal Regulations, Part 23. They determined that this matter is a dispute between a prime contractor and a subcontractor, not a case of discrimination on the basis of gender. Therefore, neither the DOT/OCR nor the FHWA has jurisdiction over resolution of the dispute.

Two points were not in dispute. First, the work performed by T.I. was satisfactory. Second, repeated disagreements occurred between T.I. and Kiewit/Perini concerning scheduling and site preparation, as well as who would perform what work, how it would be accomplished, and the amount of compensation.

Disputes of this type are not unusual. When they occur, the prime contractor may find they interfere with the orderly conduct of business. In addition to being frustrating, they are nearly impossible to resolve and are likely to lead to litigation. Therefore, the contractor may terminate a subcontractor "for convenience."

The PennDOT, which is the contracting agency, would not normally get involved in disputes of this type if they involve a non-disadvantaged business enterprise (DBE) subcontractor. When a DBE is involved, PennDOT must assure contract provisions regarding DBE goals are met. In this case, the matter was reviewed by the State's Good Faith Efforts Comittee, which heard oral presentations and reviewed documents provided by Kiewit/Perini and T.I. After doing so, the committee approved the termination. We have concluded that in approving Kiewit/Perini's decision, PennDOT acted in accordance with the contract provisions.

If you have any further questions, please let me know.

Sincerely yours,

/s/ Thomas O. Willett
THOMAS O. WILLETT
Director, Office of Engineering

FHWA:HPD-1:RWeingroff:rw:6-4856:12/13/90
REVISED PER WBaccus:12/21/90
cc: S-30 (Complaint No. 90-583)
HOA-3(ES), Files HNG-20,
S-10 (DOT 900627-003)

Mr. Kane 3212
Mr. Willett 3212
Mr. Weseman HNG-20
HCR-1, HCR-30,
Reader HNG-20

Official File 3218
Chron File HNG-20
Reader 3218
HCC-1, HCC-32
HRA-03, HDA-PA (2)

[SEAL]

U.S. Department
of Transportation

Federal Highway
Administration

400 Seventh St., S.W.
Washington, D.C. 20590

December 27, 1990
Refer to: HPD-1

The Honorable Bill Goodling
House of Representatives
Washington, D.C. 20515

Dear Mr. Goodling:

This is in further reply to your July 30 letter on behalf of Mrs. A. Dixie Evans, President of T. I. Construction Company, Inc. (T.I.), of Camp Hill, Pennsylvania. You asked us to keep you informed of our review of her concerns about the decision by the prime contractor on the Blue Route construction project, Kiewit/Perini, to terminate her subcontract.

On August 14, I informed you that we had received a request from Mrs. Evans' attorney, Mr. William D. Moyer, Jr., requesting a new review of the decision to allow Kiewit/Perini to remove her firm, operating as a disadvantaged business enterprise, from the project. After reviewing the allegations, we have concluded that the termination was handled properly and that we can find no evidence of discrimination against T.I.

We are today advising Mr. Moyer of our conclusions. I am enclosing a copy of the letter for your information. If you have any further questions, please let me know.

Sincerely yours,

/s/ T. D. Larson
T. D. LARSON
Administrator

Enclosure

[SEAL]

Office of the Administrator

U.S. Department
of Transportation

Federal Highway
Administration

400 Seventh St., S.W.
Washington, D.C. 20590

February 14, 1991
Refer to: HPD-1

The Honorable Bill Goodling
House of Representatives
Washington, D.C. 20515

Dear Mr. Goodling:

Thank you for your January 14 letter following up on our recent correspondence concerning Ms. A. Dixie Evans of T. I. Construction Company, Inc., Camp Hill, Pennsylvania. After reading our letter of December 27, 1990, to her attorney, Ms. Evans asked a series of questions concerning her company's termination as a disadvantaged business enterprise (DBE) subcontractor on the Blue Route construction project.

I am enclosing a response to Ms. Evans' questions that I hope will clarify our conclusion. Following a field review, meetings with the parties involved, including Ms. Evans and her attorneys, and review of the documentary records, we have concluded that the termination of her contract was handled properly and in compliance with Federal requirements governing the DBE program.

We regret the position Ms. Evans finds herself in, but we cannot offer any other conclusion from our review of the case.

Sincerely yours,

/s/ T. D. Larson
T. D. LARSON
Administrator

Enclosure

February 1991

SUBJECT: Response to Questions Posed by Ms. A. Dixie Evans of T. I. Construction Company, Inc., Camp Hill, Pennsylvania

The following comments respond to the three questions in Ms. Evans' January 11 letter to Representative Bill Goodling concerning the circumstances surrounding the termination of her subcontract on the Blue Route construction project. She was responding to the letter of December 27, 1990, from Mr. Thomas O. Willett, Director of the Office of Engineering, to her attorney, Mr. William D. Moyer, Jr.

1. *Paragraph 3 of Mr. Willett's letter states that the Department of Transportation Office of Civil Rights (DOT/OCR) and the Federal Highway Administration (FHWA) have no jurisdiction over resolution of the matter under Title 49, Code of Federal Regulations (49 CFR) Part 23, Who is responsible for implementing Federal regulations under 49 CFR 23?*

Officials of the DOT/OCR would have jurisdiction over this matter only if they concluded that there was evidence of discrimination, as described in Title VI of the Civil Rights Act of 1964. In the absence of such evidence, DOT/OCR does not have the jurisdiction to act.

The FHWA is responsible for administration of 49 CFR 23 on Federal-aid highway projects. Our responsibilities include the review of issues involving contract provisions. In accordance with these responsibilities, we have ensured that the Pennsylvania Department of Transportation's (PennDOT) standard contract specifications regarding participation of disadvantaged business enterprises (DBE) are proper and we have investigated Ms. Evans' allegations. We are satisfied that the decision to terminate her subcontract was handled properly by the prime contractor and by PennDOT officials.

2. *Paragraph 3 of Mr. Willett's letter states that termination was not based on gender. If the DBE status of T. I. Construction is based on gender, can termination of a DBE subcontract not be based on gender?*

Under Section 106(c) of the Surface Transportation and Uniform Relocation Assistance Act of 1987, women were, for the first time, recognized by statute for inclusion as DBE's and are eligible for participation as such on federally assisted DOT contracts. Ms. Evans' firm is certified as a DBE without any differentiation because it is owned by a woman. Thus, she is not correct in her assumption that whatever happens to her company as a DBE subcontractor is based on gender and, if it is adverse, that the action must be discriminatory.

The DBE program provides a number of protections for DBE's, particularly in regard to opportunities for gaining subcontracts, but does not free them from normal contracting obligations. For example, a DBE subcontractor must do the work in an acceptable fashion and on a timely basis. If not, the prime contractor may terminate the contract. Doing so would not be evidence of discrimination based on gender or, in the case of a minority-owned DBE, race. Similarly, a prime contractor may terminate a non-DBE subcontractor who does not perform in an acceptable fashion—that is standard industry practice.

For a finding that discrimination on the basis of gender was the reason for the termination, an act must have been performed that constituted the discrimination. For example, did sexist language or suggestions by the prime contractor constitute harassment? Because of our concern about Ms. Evans' charges, the FHWA review team investigating this matter looked for evidence of actions that would constitute gender discrimination—none were found.

The DOT/OCR reviewed Ms. Evans' allegations and the FHWA's field report. If evidence of discriminatory acts

had been found, the DOT/OCR would have reviewed the matter in the context of Title VI of the Civil Rights Act of 1964. It concluded, as the FHWA did, that the facts indicated termination was essentially a contract dispute between a prime contractor and a DBE subcontractor, not a civil rights issue. Therefore, the DOT/OCR had no basis for considering this matter further and returned it to the FHWA.

3. *Paragraph 6 of Mr. Willett's letter states the FHWA's conclusion that in approving the decision by the prime contractor (Kiewit/Perini), the PennDOT acted in accordance with the contract provisions. The PennDOT cannot make a legal determination on private contract language that violates Federal regulations.*

Ms. Evans, in a January 7 letter to Representative Goodling, summed up her point in the following words:

> . . . my contract participation is protected by existing DBE regulations legislated by Congress under 49 Code of Federal Regulations, Part 23, the Surface Transportation Act of 1982, revised in 1987 to include females. This legislation clearly states that a DBE firm may be removed from a federally assisted contract for performance. The regulations DO NOT APPROVE TERMINATION FOR CONVENIENCE. (Emphasis in original).

The Federal law governing the DBE program for Federal-aid highway projects is Section 106(c) of the Surface Transportation and Uniform Relocation Assistance Act of 1987. Section 106(c) does not address the subject of termination.

The DOT's regulations on the DBE program, contained in 49 CFR 23, do not establish the reasons why a DBE subcontractor may be terminated. Instead, Section 23.45 (f)(2), the section Ms. Evans is referring to, only addressed replacement of a DBE *after* termination. In context, the language she cited reads:

> Recipients [the State highway agencies] shall require their prime contractors to make good faith efforts to replace [a DBE] subcontractor that is unable to perform successfully with another [DBE]. The recipient shall approve all substitutions of subcontractors before bid opening and during contract performance, in order to ensure that the substitute firms are eligible [DBE's].

On Federal-aid highway projects, the FHWA is responsible for ensuring compliance with 49 CFR 23. We require State highway officials to develop contract provisions and specifications meeting the regulatory requirements. These provisions and specifications are developed and approved by the FHWA under normal Federal-aid procedures and are incorporated into the contract, directly or by reference, on Federal-aid projects that have a DBE contract goal. In PennDOT's DBE specifications, Section K(3) provides that the prime contractor can substitute for a DBE firm that "fails to perform successfully" (the same language as in our regulation).

In accordance with normal industry practice, prime contractors and subcontractors enter into contractual arrangements. Neither the FHWA nor the State highway agency is a party to the contracts. However, the contracts must either make reference to or incorporate the required Federal-aid contract provisions, including those applying to DBE's. The clauses contained therein are legally binding on the signing parties, namely, the prime contractor and the subcontractor. Under Section 6(e) of the contract between Kiewit/Perini and T. I. Construction on the Blue Route project, the prime contractor can terminate the contract "for convenience." Ms. Evans signed the contract with this provision, which does not conflict with our DBE regulations.

As noted in Mr. Willett's letter to Mr. Moyer, the work T. I. Construction performed was satisfactory. In any business relationship, however, satisfactory completion of

work is only one component of "successful" performance. In this case, the problem was the lack of cooperation between the two parties—and it became ever more serious. This "friction" resulted in repeated disagreements over project details and compensation. The prime contractor finally concluded that a suitable working relationship was not possible and, therefore, terminated the contract "for convenience," as permitted by the contract terms.

Officials of the PennDOT reviewed the prime contractor's decision in accordance with 49 CFR 23.45(f)(2) to determine if a good faith effort had been made to replace T. I. Construction with a DBE firm. As a result of this review, PennDOT approved the prime contractor's revised DBE commitment plan.